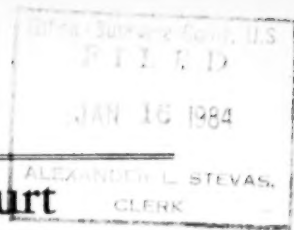


No. 83-985



In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

SOUTHERN PACIFIC TRANSPORTATION CO.,
Appellant,

VS.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA, et al.,
Appellees,

SOUTHERN PACIFIC TRANSPORTATION CO.,
Appellant,

VS.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA, et al.,
Appellees.

On Appeal from the Supreme Court of California

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

May SP once again raise the issue of federal preemption, which in prior litigation was decided against SP by the California Supreme Court and held to be *res judicata* by the U.S. District Court and the Ninth Circuit Court of Appeals?

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MOTION TO DISMISS OR AFFIRM

The Appellee (the Commission) moves the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Supreme Court of the State of California, on the grounds that the appeal rests on adequate state grounds and does not present a substantial federal question.

I

OPINIONS BELOW

The opinions below are correctly stated in Appellant's (SP's) Jurisdictional Statement.¹

II

JURISDICTION

Jurisdiction is asserted by SP under Title 28, United States Code § 1257(2). (Jur. St. 2).

III

STATEMENT OF THE CASE

1. On May 18, 1978 the County of Los Angeles (County) and appellee, the California Department of Transportation (Caltrans), filed complaints with the Commission, requesting that it order SP to institute commuter rail service between Los Angeles and Oxnard, California. Public hearings began on July 30, 1979. On June 3, 1980, the Commission issued Decision (D.) 91847, requiring SP to operate the commuter rail service sought by the County and Caltrans, both of whom were to subsidize SP's costs. The Commission granted rehearing at SP's request, limited to further consideration of the operational feasibility of combining commuter service with existing service on the line. On October 30, 1980 SP filed for review with the California Supreme Court of issues in the decision which were not reheard. The rehearing resulted in two Commission decisions, issued April 7, 1981, essentially reaffirming

¹Reference herein to Appendices are to those attached to the Jurisdictional Statement, unless otherwise indicated. "Jur. St." followed by a number refers to pages of the text of the Jurisdictional Statement.

the original decision requiring SP to provide the service (see paragraph 3 *infra*.) Also in April, after election of a new Board of Supervisors, the County dropped out of the case.

2. The federal Staggers Rail Act of 1980 (Staggers Act or Staggers), PL 96-448, 94 Stat. 1895, was enacted effective October 1, 1980. This Act was Congress' response to what it perceived as an increasing financial crisis among the nation's railroads due to inadequate freight revenues. It established "a regulatory process that balances the needs of the *carriers, shippers, and the public.*" (Emphasis added.) (H.R. Rep. No. 1430, 96th Cong., 2d Sess. 80, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4110, 4111.) The decline in the railroads' market share discussed at length in the House Report was in freight traffic. (See H.R. Rep. No. 1035, 96th Cong., 2d Sess. 38, U.S. Code Cong. & Ad. News at 3983.) Nowhere in the text of the Act is passenger service mentioned.³

Staggers established a system whereby states could seek certification by the Interstate Commerce Commission (ICC) of their standards and procedures for regulating

³A reading of the entire Staggers Act shows that Congress limited its application to freight rates, classifications, rules and practices.

Title II of Staggers is entitled "Railroad Rates and Inter-carrier Practices." It contains twenty-nine of the Act's sixty-three sections. It allows rail carriers, with stated exceptions, to raise or lower freight rates without ICC oversight. Title III is entitled "Railroad Cost Determinations." It authorizes the ICC to create a uniform freight accounting system and establishes a Railroad Accounting Principles Board to promulgate freight cost accounting principles. Title IV of the Act, "Railroad Modernization Assistance," addresses the sale, abandonment or discontinuance of rail-

intrastate freight transportation. States which did not seek certification by January 29, 1981 lost such jurisdiction, but this loss did not vest the ICC with jurisdiction; such happened only if a state sought but was denied certification. (See 49 U.S.C. Sections 10501(c), 11501(b)(4)(B).) In response to this, the ICC *sua sponte*, without statutory authorization, devised a further procedure whereby states which had not sought certification could request the ICC to assume jurisdiction.

road freight lines. The next three titles of the Act deal with labor protection payments and miscellaneous matters. Staggers, by its terms, is concerned exclusively with freight revenues.

The word "passenger" does not appear in Staggers; moreover, the Act is replete with language which precludes its application to passenger matters. For example, it provides that if a rail carrier has "market dominance over the transportation to which a particular rate applies, the rate . . . [charged] must be reasonable." (Emphasis added.) (49 U.S.C. Section 10701a(b)(1).) Applying such antitrust analysis to subsidized passenger service would be absurd. Another section provides that "[i]n any proceeding to determine the reasonableness of a rate described in [section 10701a(b)(1)](A) the shipper challenging such rate shall have the burden of proving that such rate is not reasonable . . ." (Emphasis added.) (49 U.S.C. Section 10701a(b)(2).) The reference to "shipper" unequivocally indicates that the rates that may be challenged are shipping rates and that passenger fares are beyond the scope of the section.

Section 202 of Staggers defines "fixed and variable cost" as "all cost incurred by rail carriers in the transportation of *freight* . . ." (Emphasis added.) (49 U.S.C. Section 10709(d)(1)(A).)

Section 203 of Staggers again confirms the absence of concern with passenger traffic. That section adds to the Interstate Commerce Act a new provision, Section 10707a, entitled "Zone of Carrier Rate Flexibility." This provision allows a carrier to increase its rate annually, with certain limitations varying with inflation. The base rate is established initially as the rate in effect on the effective date of the Act and is adjusted after two years and then

In early 1982, the ICC notified California of pending loss of jurisdiction to regulate intrastate rail *rates*. (The ICC proceeding, Ex Parte #388, was entitled "State Intrastate Rail Rate Authority".) In response, the Commission requested the ICC in writing to assume jurisdiction over intrastate *freight rates*. The ICC's May 11 order, which is merely one in a series of orders issued in Ex Parte #388, notified California, among others, that it had lost "all jurisdiction to regulate intrastate rail *rates*." (Emphasis added.) The order added the ICC would assume jurisdiction over "intrastate rail transportation" in those states having so requested. California had only requested the ICC to assume jurisdiction over freight rate matters. Given the language of Staggers, the scope of Ex Parte #388, and the Commission's request, the only conclusion is that new ICC jurisdiction in California was limited to intrastate freight rate matters.

3. In April, 1981, following rehearing, the Commission issued Decisions 92862 and 92863, directing negotiations

at five-year intervals. New section 10707a(a)(1)(A) defines the term "base rate" and begins "base rate" means, with respect to the transportation of a particular commodity . . ." The term "commodity" precludes passenger traffic. The exclusive concern with freight traffic is apparent.

Other sections of the Act similarly contain language that is incompatible with application to passenger matters. See, e.g., Section 205 ("products or commodities"), Section 208 ("shipper"), Section 211 ("transportation of property" and "shipper").

SP points to paragraphs 21 and 25 of 49 U.S.C. Section 10102, which define "rate" and "transportation", respectively, as pertinent to resolving the intent of Congress in enacting Staggers. However, those definitions were operative prior to Staggers. They did not grant jurisdiction to the ICC over intrastate commuter service prior to Staggers, nor do they after Staggers.

between Caltrans and SP, and restating its original order requiring SP to construct stations and publish a tariff governing the service. These last requirements were subsequently stayed to give SP and Caltrans time to pursue further negotiations. In its petition to the Commission for rehearing of these subsequent decisions, which was denied, SP first raised its Staggers Act preemption argument. SP filed a second petition for review of these decisions in the California Supreme Court (S.F. 24316), in the course of which the preemption issue was again raised, both by the Commission and by SP. (See Appx. pp. 252a, 270a; Appx. to Petition for Writ of Certiorari in *Southern Pacific Transportation Co. v. Public Util. Comm., et al.*, Docket No. 83-1053, pp. 74a-76a, 90a-94a.)

4. Meanwhile, in December, 1980, the State of Texas had filed suit against the ICC challenging the constitutionality of the Staggers Act. California and numerous other states became intervenors, as did SP and several other railroads. The sole issue raised by plaintiffs California, Texas, New York, and Kansas was the constitutionality of Staggers' preemption of state regulation of intrastate *freight rates*. See Plaintiff-Intervenors' Memorandum in Support of Plaintiffs' Motion for Summary Judgment, *Texas v. United States* (Civil No. A-80-CA-487). Defendants, and most definitively the ICC, maintained that Staggers preemption over such *freight rates* was constitutional. See Federal Defendants' Opposition to Plaintiff-Intervenors' Motion for Partial Summary Judgment, *Texas v. United States, supra*. This suit, summarily decided at the federal District Court level against Texas, accepted defendants' argument that the degree to which Staggers pre-

empted states from *such rate regulation* was not unconstitutional.

The *Texas* litigation, now on appeal, had no bearing on the PUC proceedings in California. SP presents no support for its specious conclusion to the contrary. (Jur. St. 9, 22.)

5. On December 23, 1981 the California Supreme Court denied without written opinion SP's petition for writ in S.F. 24316, as well as its earlier appeal of the Commission's original decision. SP did not seek review of this denial in the U.S. Supreme Court, even though such review was available under 28 U.S.C. Section 1257.

6. On June 2, 1982, after five additional months of unsuccessful negotiations between Caltrans and SP had resulted only in SP's refusal to institute the service ordered in D.91847, the Commission issued D.82-06-045. This decision renewed its order to SP to construct the passenger facilities and improvements previously found needed, to commence such work on June 15 and to complete it by October 15, 1982, and to file tariffs for the commencement of the service.

7. SP did not seek rehearing of the June 2 decision before the Commission or review before the California Court, nor did it begin implementing the order. Rather, SP challenged said decision before the United States District Court for the Northern District of California (C-82-3074-MHP). SP alleged federal preemption under the Staggers Act and undue burden on interstate commerce. On August 9, 1982, the District Court granted summary judgment against SP on grounds of *res judicata*, i.e., that SP

had raised or could have raised before the California Court all the issues it sought to bring before the District Court and therefore SP had had its day in court. (Appx., pp. 250a-258a.)

8. On August 17, 1982 SP filed a notice of appeal of the District Court's order with the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit ultimately upheld the order on September 27, 1983. (*Southern Pacific Transportation Co. v. Public Util. Comm., et al.*, No. 82-4466; Appx., pp. 261a-271a.) On December 23, 1983 SP filed a Petition for Writ of Certiorari with this Court seeking review of the Ninth Circuit decision. (*Southern Pacific Transportation Co. v. Public Util. Comm., et al.*, Docket No. 83-1053.)

9. Meanwhile, on August 4, 1982, Caltrans filed an application before the Commission for an order to show cause why the officers and directors of SP should not be found in contempt for failure to comply with the terms of the June 2 order.

10. On September 29, at formal Commission hearings, SP's Vice President of Maintenance testified SP had no current plans to comply with D.82-06-045 or to begin the construction required by that order. Likewise, SP counsel stated on the record that SP did not intend to comply with the requirement to construct the passenger facilities ordered.

11. The Commission on October 6 issued an interim decision (D.82-10-031) following hearings on September 27 and 29 on Caltrans' application for an order to show cause. This decision granted Caltrans an immediate right of entry onto SP property at several locations in order to construct

the passenger facilities which SP had refused to construct. A concurrent decision denied SP's untimely petition to reopen and set aside the order of June 2, 1982. Pursuant to the right of entry order, Caltrans constructed several passenger station facilities.

12. On October 8 SP petitioned the California Supreme Court for a temporary stay under provisions of the California Public Utilities Code, which was denied on October 12.

13. On October 18, after weekend negotiations and an agreement by SP to operate the trains while still pursuing its avenues, if any, for legal relief, the Commission issued D.82-10-041 again ordering the service, and the service finally commenced.

14. On October 20 SP filed for an injunction pending appeal in the U.S. District Court, which was denied on November 3. The Court found the status quo had changed substantially, that further litigation was pending before the California Supreme Court, and that SP was not likely to prevail on the merits of its appeal. (Appx., pp. 259a-260a.)

15. On October 27 SP sought rehearing before the Commission of the Commission's two October decisions.

16. On November 3 SP filed an Emergency Motion for Injunction Pending Appeal in the U.S. Court of Appeals for the Ninth Circuit (No. 82-4466). This was denied on November 12.

17. Also on November 3 the Commission dismissed Caltrans' application for an order to show cause why SP

should not be held in contempt on the grounds that construction of station platforms and related facilities was complete, locomotives had been leased by SP, and the commuter service had commenced on October 18.

18. On November 18 SP filed another motion for temporary stay with the California Supreme Court, denied on December 23.

19. On January 14, 1983 SP sought review in the California Supreme Court of Decisions 82-10-031 and 82-10-041 (S.F. 24525).

20. On February 7, 1983, without seeking PUC authorization, SP stopped running the commuter service on the ground that Caltrans was not making the requisite subsidy payments to SP. (See para. 26, *infra*.)

21. On February 9 SP resumed the service.

22. On February 11 the PUC issued an order to show cause why SP should not be held in contempt for violating D.82-10-041 by stopping the service. Hearing was held February 15.

23. On February 17 the PUC found SP to be in contempt and assessed an appropriate fine (Decision 83-02-079).

24. On March 11 the PUC issued D.83-03-027, authorizing temporary suspension of the commuter service because 1) Caltrans and SP could not come to agreement on the amount of subsidy required and on related liability and equipment issues, 2) Caltrans was uncertain whether present funding was sufficient to meet expenses already incurred or to be incurred in future, and 3) the Governor's budget

for fiscal year '83-'84 did not fund the service. While the PUC formally retained authority to reconsider should circumstances change, this order in practical terms made the service a dead letter.

25. SP timely sought California Supreme Court review of D.83-02-079 (S.F. 24573). The California Court without opinion denied review of both S.F. 24525 and 24573, on August 18 and September 14 respectively. These denials are the ones at issue in the instant case.

26. Meanwhile, in late 1982, after issuance of the federal District Court order against it, SP began several related proceedings before the ICC. It filed a tariff which it alleges entitles it, *inter alia*, to subsidy payments from Caltrans greatly exceeding those contemplated by the Commission. (See para. 20, *supra*.) It subsequently filed an application under Staggers for discontinuance of the service, which has been ruled on by an ICC administrative law judge favorably to SP. Both of these actions were taken in derogation of all court orders issued against SP. Both are in various stages of appeal.

IV

ARGUMENT

A. SP Has Misstated the Question Presented by This Case

SP asserts that two federal questions are presented; to wit: (1) whether a state failing to seek certification under the federal Staggers Act can order an interstate railroad to provide intrastate commuter passenger service; and (2) whether California can hold in contempt a railroad and two of its managing officers for suspending that service under a right allegedly conferred in a tariff which the railroad was allegedly required to file with the ICC.

By stating the questions in the above manner, SP is attempting to deflect the Court's attention from the real issue in this case: whether, in 1981, SP's failure to seek this Court's review of the California Supreme Court's denial of a petition for writ of review wherein SP's claims under the Staggers Act were raised before and rejected by that court, resulted in those claims becoming *res judicata* in all subsequent litigation between the same parties on the same issues. As is demonstrated in this Motion, this question must be answered affirmatively. Consequently, the decisions SP now protests rest on adequate and independent state grounds and raise no federal question within the jurisdiction of this Court.

B. The Decisions Below Rest on Adequate and Independent State Grounds

1. SF 24525 Was Decided on the Basis of California Law Alone

This Court has, in recent years, followed the rule that:

"... Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." *Durley v. Mayo*, 1956, 351 U.S. 277, 281, citing *Stembridge v. Georgia*, 1952, 343 U.S. 541, 547. (Emphasis in original.)

The California Supreme Court in S.F. 24525 denied SP's petition for writ of review without written comment. But the Commission's and Caltrans' primary contention was that because the federal preemption question was before that same Court in 1981, that Court's action in denying SP's petitions for writ of review in 1981 made the issue

res judicata under principles of California law. Thus it was barred from the California Court's consideration in S.F. 24525.

This conclusion is not changed by this Court's recent decision in *Michigan v. Long*, 1983, U.S., 77 L.Ed. 2d 1201. This decision states:

"Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." U.S. at, 77 L.Ed.2d at 1214.

Here, the California Court did not specify the grounds for its denial. However, when all of the different aspects of this case are examined, the decision does not fairly appear to rest primarily on federal law. Rather, it is clear that an independent and adequate state ground must form the basis for that denial.

SP, after having been denied a hearing in the California Court in 1981, sought an injunction against the Commission in federal District Court, raising the same federal preemption claim as had been raised and rejected in the California Court. The District Court agreed with the Commission and Caltrans that the issue had been or should have been raised in the California Supreme Court, and that it was *res judicata* for the purposes of the federal proceeding. The Ninth Circuit agreed and affirmed the District Court's ruling.

While the federal courts' decisions were based on *res judicata* principles as applied to the federal courts, the same rule applies, pursuant to California law, to issues raised in a subsequent lawsuit in the California courts on the same cause of action between the same parties. *Slater v. Blackwood*, 1975, 15 C.3d 791, 795; *Busick v. Workmen's Comp. App. Bd.*, 1972, 7 C.3d 967, 973; *Panos v. Great Western Pack. Co.*, 1943, 21 C.2d 636, 639. The California Supreme Court has applied this rule to appeals of Commission decisions in *Consumers Lobby Against Monopolies v. Public Util. Comm.*, 1979, 25 C.3d 891, 901.

The Staggers argument was raised to the California Supreme Court in 1981.³ That Court's rejection of SP's petitions for review is a decision on the merits for *res judicata* purposes. *Consumers Lobby, supra*; *Pacific Tel. and Tel. Co. v. Public Util. Comm.*, 9th Cir., 1979, 600 F.2d 1309, cert. denied 444 U.S. 920. SP did not seek review by this Court of the California Court's decision, and is thus barred by *res judicata* principles articulated in the California cases cited above from bringing its claims to this Court now. See also *Durley v. Mayo, supra*, 351 U.S. at 284; *Grubb v. Public Util. Comm. of Ohio*, 1930, 281 U.S. 470, 477-479. It is no defense that SP did not argue its claim as strenuously as it later decided it should have. California law provides that *res judicata* is a complete bar to later

³As stated *supra*, SP raised its Staggers claim in an attachment to its petition before the Commission for rehearing of the two orders issued in April, 1981. SP then submitted that document, as well as D.93211 where the Commission stated its disagreement with SP's Staggers argument, to the California Court as part of SP's supplement to its first petition for review. Finally, the issue was raised again in S.F. 24316, the 1981 petition to the California Court, where SP devoted seven pages of its reply brief to its Staggers claim.

suits between the same parties on the same cause of action, not only as to matters heard but as to matters that could have been heard in support of or in opposition thereto. *Slater v. Blackwood, supra*; *Price v. Sixth Dist. Agric. Assn.*, 1927, 201 C. 502, 511. See also *Grubb, supra*, 281 U.S. at 478.

SP's arguments that the Staggers issue could not have been before the California Court in 1981 are completely without merit. Its argument that the Commission had deferred substantive provisions of its order while the Texas litigation was proceeding has no basis in fact. Even assuming *arguendo* that SP's "substantive provisions" argument has some meaning, it becomes totally transparent when it is realized that the "final" Commission order, so characterized by SP in its petition to the California Court in S.F. 24525, was issued on June 18, 1982, five months before the November 3, 1982 order was issued by the Texas District Court.

SP's further argument that it had pointed out to the California Court that the Staggers issue was not before that Court but before the Texas court fails on two counts. First, SP cites no rule of law which allows a party to decide, where a state and federal court have concurrent jurisdiction of a federal issue, that the state court cannot hear the issue where that issue has been raised by one of the parties and responded to by the other. The exception, where the abstention doctrine is applied by a three-judge federal court so that a state court may first consider the state issues, and where a party has specifically reserved the right to return to federal court if necessary on the federal issues, is not present here. Hence, *England v. Board of Med. Exam.*, 1964, 375 U.S. 411, is inapplicable.

Further, the issue of whether Staggers preempts states from ordering publicly subsidized commuter passenger train service was never before the Texas court. The defendants, including SP and the federal Department of Justice on behalf of the ICC, argued vigorously that the only area where Staggers preempted states was in rate regulation. The district court, in sustaining defendants' motion for summary judgment, concurred. Rate regulation, however, involves neither the passenger versus freight issue nor the question of whether states can order a railroad operating both inter- and intrastate to provide publicly subsidized intrastate commuter service.

Dump Truck Owners Assn. v. Public Util. Comm., 1977, 434 U.S. 9, is equally inapplicable. In that case, the Commission had granted rehearing while the appeal to this Court was pending, and was reconsidering the rate order appellants had challenged as unconstitutional. This reconsideration might well have made the federal claim moot; thus it was reasonable for this Court to have dismissed the action as being premature. In the case at bar, the rehearing granted by the Commission had been concluded prior to SP's filing S.F. 24316 in the California Court. While certain aspects of the decision had been stayed, the Commission was not in the process of reconsidering any issues related to SP's federal claim. Moreover, it is completely inconsistent for SP to claim that although no cognizable federal issue existed in the California proceedings, such an issue did exist in the Texas proceedings, which did not even remotely involve review of a state order that a railroad provide intrastate passenger commuter service.

Finally, SP's reliance on *Cox Broadcasting Corp. v. Cohn*, 1975, 420 U.S. 469, is misplaced. *Cox* involved the

issue of finality of the state judgment. Here, there is no doubt whatsoever that the California judgment in 1981 was final on the federal issue and appealable to this Court. This judgment was not subject to further review in the state courts. Moreover, no further proceedings in the state court were anticipated, except inasmuch as such could be predicted to be inevitable from SP's past litigation behavior. Finally, even assuming *arguendo* that further state issues could be anticipated to be before the California Supreme Court, appeal of the Stagers issue before this Court was ripe under *Cox*. As in that case, even if SP prevailed in those proceedings on nonfederal grounds, if the California Court had erroneously upheld the Commission's order, those further proceedings should never have occurred at all. *Cox, supra*, 420 U.S. at 485.

2. SF 24573 Was Clearly Decided on Independent State Grounds

The order SP challenged in S.F. 24573 was, plainly and simply, an enforcement order issued by the Commission in response to SP's willful disobedience of a lawfully issued Commission order. California Public Utilities Code Section 2113 gives the Commission authority to hold in contempt a party who fails to comply with a lawful Commission order. While SP had asserted a right to suspend the commuter services based on its ICC tariff, neither Caltrans nor the Commission has ever conceded the validity of this tariff, which is currently being challenged by Caltrans before the ICC.

More importantly, SP had obtained no judicial restraints against the enforcement of the Commission's orders; all courts to which the issue of the lawfulness of those orders

had been presented had sustained them. As in S.F. 24525, the Staggers issue had long since become *res judicata*. Thus the Commission was within its authority under state law in finding SP and two of its officers in contempt and fining them appropriately. The California Court had no federal issue properly before it, and thus needed to decide none in denying SP's petition for writ of review.

C. The Denial of SP's Petitions for Writ of Review by the California Supreme Court Raises No Federal Question

No federal question has been presented to this Court. SP's claims that the Commission's orders were barred by Staggers Act preemption were deemed not cognizable because of *res judicata* by the federal District Court, the Ninth Circuit Court of Appeals, and, by undeniable inference, the California Supreme Court. It has long been settled that *res judicata* does not present a substantial federal question to this Court. *City and County of San Francisco v. Itsell*, 1890, 133 U.S. 65, 67.

CONCLUSION

For the foregoing reasons, the appeal filed by SP presents no question warranting review of the decisions below, and should be dismissed. Alternatively, the judgments below should be affirmed.

Dated, San Francisco, California

January 13, 1984.

Respectfully submitted,

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